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Transformative constitutionalism and the framework of the common law of personality

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TRANSFORMATIVE CONSTITUTIONALISM AND THE FRAMEWORK OF THE COMMON LAW OF PERSONALITY

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Abstract

This article interrogates the constitutionalisation of the framework of the common law of personality – its substance and method – against the transformative constitutionalism paradigm. The transformative constitutionalism paradigm requires greater reflexivity as to the balancing of individualistic and collectivist values in common law frameworks. Such a constitutionalisation process must be influenced by legal culture and ideology as an overarching ideological concern. The Constitutional Court in Le Roux v Dey *2011 3 SA 274 ostensibly attempted to align the framework of the common law of personality with the Constitution of the Republic, 1996 (the "Constitution"). However, the court failed to articulate the human personality as a composite legal interest consisting of various personality rights, underscored by human dignity, due to a superseding preoccupation with subjective feelings of self-worth. This reduced the composite nature of the human personality and the multifaceted nature of human dignity. The same preoccupation also prevented the separate and distinct application of the requirements of the* actio iniuriarum *to articulate the human personality as a composite legal interest. This article refers to the court's judicial line of reasoning as "the* iniuria *approach". This approach gives rise to an inadequate alignment between the common law and the Constitution, resulting in a substantive mismatch. Such a substantive mismatch is a "defective conversion", of which the underlying cause is an underpinning ideology of pre-constitutional notions of (classical) liberalism) concealed through a conservative legal culture with attendant formalistic modes of legal reasoning. This causes an imbalance between individualistic and collectivist values permeating the common law's framework in contradiction to the transformative constitutionalism paradigm. This imbalance frustrates the development of the framework of the common law of personality in line with constitutional values and necessitates the rejection of the* iniuria *approach in favour of a more transformative approach.*

* This article is based on the second ("The Transformative Paradigm and Doctrine"), third ("Ideology and Human Dignity") and fourth ("Legal Ideology, Culture and the Common Law Framework") chapters of CJ Visser *Human Dignity and the* Actio Iniuriarum*: A Constitutionalised Approach to Personality Infringements* PhD thesis Wits (2020). This article is dedicated to Deeksha Bhana who was my PhD supervisor. Thank you to Emile Zitzke for his helpful input on this article. I am also indebted to the reviewers of this article who provided invaluable insights.

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Keywords: *Transformative constitutionalism; horizontality theory and application; legal culture, ideology, and method; law of delict; law of personality;* actio iniuriarum

1 Introduction

"No substantial mismatch should exist between private law and the Constitution."[1]

This article is concerned with the constitutionalisation of the framework of the common law of personality. For purposes of clarity, the framework of the common law of personality refers to its substance and method.[2] In terms of substance, the focus here is on the specific manner in which the judiciary conceptualises the human personality as underscored by the constitutional value of human dignity.[3] Considering method next, the focus here is on how the judiciary articulates the human personality in positive law through the requirements of the *actio iniuriarum* when determining liability for a personality right infringement (an *iniuria*).[4]

The constitutionalisation of the framework of the common law of personality must conform to the transformative constitutionalism paradigm.[5] The transformative constitutionalism paradigm requires an effective alignment (as opposed to a "substantial mismatch") between the Constitution of the Republic, 1996 (the "Constitution") and the framework of the common law.[6] An effective alignment manifests when the framework of the common law achieves an adequate balance between individualistic and collectivist values to realise relevant constitutional imperatives.[7] It is important to note that this depends on the influence that legal culture and ideology have on the framework of the common law.[8] A substantial mismatch between the Constitution and the common law often is spurred by legal culture and ideological influences that create a preference for either individualistic or collectivist values that may hamper the aforementioned balance and imperatives.[9] Therefore the transformative constitutionalism paradigm requires great reflexivity as to the

1 E Zitzke "A Constitutionally Wanting *Obiter* on Omissions: *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA)" (2018) 81 *THRHR* 497 499.

2 CJ Visser "The Doctrine of Subjective Rights, the *Actio Iniuriarum* and the Constitution: A Convergent Doctrinal Basis for the Law of Personality" (2021) 32 *Stell LR* 272 273-274; CJ Visser "Adjudicative Subsidiarity, the 'Horizontality Simpliciter' Approach and Personality Rights: Outlining an Integrated and Constitutional Reading Strategy to the Law of Personality" (2022) 55 *DJ* 124 124-125.

3 Visser (2022) *DJ* 124-125.

4 124-125.

5 In brief, transformative constitutionalism has been described as:
"a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction".
See KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

6 Zitzke (2018) *THRHR* 499.

7 D Bhana & CJ Visser "The Concurrence of Breach of Contract and Delict in a Constitutional Context" (2019) 35 *SAJHR* 94 107.

8 D Kennedy "Form and Substance in Private Law Adjudication" (1976) 89 *Harv LR* 1685 1713, 1756; A Cockrell "Substance and Form in the South African Law of Contract" (1992) 109 *SALJ* 40 43; Klare (1998) *SAJHR* 168, 170.

9 E Zitzke "Stop the Illusionary Nonsense! Teaching Transformative Delict" (2014) 46 *Acta Academia* 52 57-60.

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specific types of ideologies and legal culture that underpin the framework of the common law.[10] Therefore, the transformative constitutionalism paradigm requires the interrogation of the underlying ideologies of framework of the common law, which would have been otherwise concealed through legal culture.[11] These ideologies must then be compared to the objective normative value system of the Constitution to consider the effective constitutionalisation of the framework of the common law.[12]

Against this background, the Constitutional Court's judgment in *Le Roux v Dey*[13] ("*Le Roux*") ostensibly attempted to align the framework of the common law of personality with the Constitution.[14] In terms of substance, the court reduced the human personality and human dignity to subjective feelings of self-worth.[15] Traditionally, the human personality is conceptualised as a composite interest consisting of various personality rights, whereas human dignity is understood as a multifaceted concept encompassing both individualistic and collectivist values.[16] In terms of method, the court realised its conceptions of the human personality and human dignity as subjective feelings of self-worth through the ambiguous and indistinct application of the requirements of the *actio iniuriarum*.[17] Traditionally, positive law articulated the human personality as a composite interest through the requirements of the *actio iniuriarum*, which are applied separately and distinctively.[18]

At face value, it appears that the court's approach to the substance and method of the common law of personality is at odds with the transformative constitutionalism paradigm. For one, the court created a substantial mismatch between the substance and method of the common law of personality and the Constitution regarding the composite nature of the human personality. Furthermore, the court's preoccupation with subjective feelings of self-worth seems to favour individualistic values over collectivist ones. However, the court made no reference to any ideological dimensions in its reasoning process.

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[10] D Bhana "The Role of Judicial Method in Contract Law Revisited" (2015) 132 *SALJ* 122 130 130-131; E Zitzke "The History and Politics of Contemporary Common-Law Purism" (2017) 23 *Fundamina* 185 186.

[11] D Bhana "The Role of Judicial Method in the Relinquishing of Constitutional Rights through Contract" (2008) 24 *SAJHR* 300 302-303; Zitzke (2014) *Acta Academia* 61.

[12] CJ Visser "Revisiting the Constitutionalisation of the Common Law of Personality: Transformative Constitutionalism and *Le Roux v Dey*" (2020) 36 *SAJHR* 242 258.

[13] 2011 3 SA 274 (CC).

[14] *Le Roux v Dey* 2011 3 SA 274 (CC) judgment sets the stage for the post-constitutional operation of the common law of personality, as this judgment remains one of the most influential and authoritative sources in this area of law. It is important to note that the precedent set by the judgment has been incorporated as a general rule that a potential plaintiff cannot claim for multiple personality infringements on the same set of facts and they must be claimed in the alternative. See *Pieterse v Clicks Group Ltd t/a Clicks Stores* 2015 5 SA 317 (GJ) para 5; *Jankielsohn v Booysen* 2020 1 All SA 214 (FB) para 44; *Du Toit v Coetzee* (A122/2021) 2022 ZAFSHC 105 (2 June 2022) para 25 *SAFLII* <https://www.saflii.org/za/cases/ZAFSHC/2022/105.html> (accessed 10-12-2023); *Phaleng-Podile v Dovey* (28223/2020) 2022 ZAGPJHC 656 (6 September 2022) para 41 *SAFLII* <https://www.saflii.org/za/cases/ZAGPJHC/2022/656.html> (accessed 10-12-2023); *Mdhlovu v National Director of Public Prosecutions* 2023 1 All SA 458 (MM) para 10.

[15] *Le Roux v Dey* 3 2011 SA 274 (CC) paras 138-143.

[16] WA Joubert *Grondslae van die Persoonlikheidsreg* (1953) 10-12; J Neethling, J Potgieter & A Roos *Neethling on Personality Rights* 3 ed (2019) 25-40.

[17] *Le Roux v Dey* 2011 3 SA 274 (CC) paras 138-152.

[18] Joubert *Persoonlikheidsreg* 10-12; Neethling et al *Personality Rights* 24-40.

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At a rudimentary level, this mismatch and preoccupation suggest the prevalence of pre-constitutional notions of (classical) liberalism that are camouflaged through a conservative culture.[19] This is arguably an uneasy fit for the transformative constitutionalism paradigm.

However, human dignity encompasses both individualistic and collectivist values. As human dignity underscores the human personality, it is reasonable to assume that these very same values would be deeply ingrained within it (when these concepts are not reduced to subjective feelings of self-worth). This may explain the need to articulate the human personality as a composite interest consisting of various personality rights and its concomitant expression in the positive law through the distinctive and separate application of the requirements of the *actio iniuriarum*.[20] After all, human dignity is supposed to connect the human personality to constitutional imperatives related to the development of the individual and the maintenance of social cohesion, which requires an appropriate balance between individualistic and collectivist values.[21] In essence, this seems to be a better fit with the transformative constitutionalisation paradigm.

Therefore, the purpose of this article is to interrogate the court's approach in *Le Roux* to the ostensible alignment between the substance and method of the common law of personality with the Constitution through the transformative constitutionalism paradigm.

Part 2 of the contribution explores the transformative constitutionalism paradigm in terms of its precepts for a substantial alignment, the effect that legal ideology and culture may have on such alignment, considering the balancing of individual and collectivist values, and the ideological dimensions that ought to permeate this paradigm in the context of the law of personality. The transformative constitutionalism paradigm acts as the theoretical framework to this article.

Thereafter, in part 3, the nature and extent of the mismatch created by the court in *Le Roux* require closer scrutiny to highlight the specific adjustments that were made to the framework of the common law.

Penultimately, in part 4, the impact, underlying cause, and ideological dimensions of these adjustments need to be interrogated against the transformative constitutionalism paradigm. This is required to show how these adjustments may or may not frustrate the constitutional development of the common law of personality. This in turn will elucidate whether the court's approach ought to be rejected. In this part of the contribution, my arguments are concretised.

Lastly, if the court's approach ought to be rejected, contemplation is required on the way forward, such as the development of an alternative approach. This is considered in part 5 which concludes the discussion.

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[19] Cockrell (1992) *SALJ* 43; Klare (1998) *SAJHR* 168, 170.

[20] Visser (2020) *SAJHR* 248-249; Visser (2021) *Stell LR* 275.

[21] *Bernstein v Bester* 1996 2 SA 634 (CC) para 65; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 5 SA 3 (CC) para 36.

At this juncture, it is necessary to address some naming conventions that will be used in the remainder of this discussion for reasons that will subsequently become clearer. This article refers to the approach adopted by the Constitutional Court in *Le Roux* as "the *iniuria* approach". Furthermore, a substantial mismatch between the common law and the Constitution will be referred to as "a defective conversion".

2 Transformative constitutionalism and the framework of the common law of personality

2 1 Introduction: General propositions of the transformative paradigm

In terms of the plethora of jurisprudence available on the transformative constitutionalism paradigm, for purposes of aligning the common private law with the Constitution, this part articulates a few general propositions constituting this paradigm. These propositions draw inspiration from certain judgments of the Constitutional Court and the works of Deeksha Bhana and Emile Zitzke, who contextualised the transformative paradigm in the context of the law of obligations (of which the law of personality forms part).[22]

First, according to the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*,[23] the transformative constitutionalism paradigm envisions "a single system of law" in which the common law is not treated as a "separate" or "distinct body of law" to that of the Constitution. Within this single system of law, the common law "derives its force from the Constitution and is subject to constitutional control" so that it can give effect to the transformative aspirations of the Constitution.[24] As a result, when regulating private relationships, a single and integrated body of constitutionalised private law should emerge.[25] In the context of this single system of constitutionalised private law, the Constitutional Court, in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd*,[26] highlighted the importance of the frameworks of the common law. As explained by the Constitutional Court in *Gcaba v Minister for Safety and Security*,[27] the "Constitution recognises the need for specificity and specialisation in a modern and complex society" which ought to be found in the respective areas of law, including private law. In other words, the

[22] See generally Bhana (2008) *SAJHR* 300; D Bhana "The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution" (2013) 29 *SAJHR* 351; Zitzke (2014) *Acta Academia* 52; Bhana (2015) *SALJ* 122; E Zitzke "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" (2015) 7 *CCR* 259; E Zitzke "Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of *Heroldt v Wills* 2013 2 SA 530 (GSJ)" (2016) 69 *THRHR* 103; Zitzke (2017) *Fundamina* 185. These authors draw further inspiration from the works, among others, of the following academic commentators: Kennedy (1976) *Harv LR* 1685; Cockrell (1992) *SALJ* 40; Klare (1998) *SAJHR* 146. Another notable and relevant work on the general tenure of the transformative constitutionalism paradigm concerning legal method, ideology and culture includes JC Froneman "Legal Reasoning and Legal Culture: Our 'Vision' of Law" (2005) 16 *Stell LR* 3.

[23] 2000 2 SA 647 (CC) para 44.

[24] Bhana (2013) *SAJHR* 353.

[25] Zitzke (2015) *CCR* 286.

[26] 2016 1 SA 621 (CC) para 37.

[27] 2010 1 SA 238 (CC) para 56.

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Constitution contains transformative aspirations that provide private law with its operative force, while the specificity and specialisation are found in the frameworks regulating private relationships.[28]

Secondly, it must be kept in mind that the frameworks of private law have their inherent limitations.[29] For one, from a critical legal history perspective, parallel to the transformative paradigm,[30] the frameworks of South African private law "evolved from an ancient society" that organised itself "through centuries of feudalism, colonialism, … exploitation" and, more recently, according to the influences of apartheid in the South African context.[31] However, according to Jeremy Waldron, one must also take note of the "universalisation" of human dignity during the eighteenth and nineteenth centuries, which gradually recognised the human autonomy, personality, and agency of larger segments of society (although a claim for full egalitarianism cannot be made).[32] As a result, according to Waldren, societies were incrementally organised according to this new-found sense of dignity, but this was linked to high social status and not to the unconditional inner worth of all individuals.[33] This inevitably gave way to imbalanced power dynamics between private individuals, which obscured the attainment of social justice at this level.[34] Consequently, the liberty experienced during this period of universalisation, in the basic pursuit of attaining "the good life", was ideologically couched in pre-constitutional notions of (classical) liberalism.[35]

With (classical) liberalism, the basic pursuit of the good life is characterised by dominant values such as self-interest, self-reliance, and self-determination, which frame individuals as atomistic units whose personal autonomy competes with that of others.[36] As an organising ideology in private law, (classical) liberalism only requires individuals to respect these lines of individual liberty, without requiring them to share or sacrifice the pursuit of their interests or to protect the interests of others.[37] On a macro level, this pursuit of the good life operates in a *laissez-faire* market economy that commodifies the human experience according to stagnant social strata and disparate financial wealth and places a low premium on the absolute inner human worth of individuals and their interconnectedness to one another.[38] Arguably, classical liberalism, as a constitutive private law ideology, has the propensity to entrench the

[28] *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 56. See also *Dendy v University of the Witwatersrand* 2007 8 BCLR 910 (SCA) paras 15, 24.
[29] Zitzke (2014) *Acta Academia* 64-67.
[30] Zitzke (2014) *Acta Academia* 67-69. See generally Zitzke (2017) *Fundamina* 185.
[31] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 36.
[32] J Waldron "Lecture 1: Dignity and Rank" in M Dan-Cohen (ed) *Dignity, Rank & Rights* (2016) 13 34-36.
[33] 34-36.
[34] 34-36.
[35] Bhana (2008) *SAJHR* 302.
[36] Kennedy (1976) *Harv LR* 1713; J Nedelsky "Reconceiving Rights as Relationships" (1993) 1 *Rev Const Stud* 1 7-8; Bhana (2015) *SALJ* 124.
[37] Kennedy (1976) *Harv LR* 1713; Froneman (2005) *Stell LR* 17; Bhana (2015) *SALJ* 124. See also Zitzke (2014) *Acta Academia* 57.
[38] Zitzke (2014) *Acta Academia* 64-67.

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status quo in the private realm, with a resultant weak focus on substantive transformation.[39]

Thirdly, and closely associated with the second proposition, the underpinning ideologies of the private law frameworks, such as those pertaining to pre-constitutional notions of (classical) liberalism, are effectively concealed through their underlying legal culture.[40] In general, legal culture refers to a system of beliefs held by the legal fraternity about the ideological nature of the legal reasoning process; in other words, the extent to which "extra-legal factors" such as "social background, personal preferences and convictions, and political beliefs and commitments" of legal decision-makers influence the legal reasoning process, among others.[41] These ideologies, for purposes of law, range from individualism to collectivism.[42] In pre-constitutional South African legal culture, judicial and legal decision-makers believed that the frameworks of the private law were "value-neutral", despite their liberal underpinnings.[43] According to Zitzke (with reference to Karl Klare), the reasoning behind this is that the South African legal mindset firmly believed in the certainty and determinacy of law. This view was politically contextualised in an atmosphere of conquest and imposition rather than one of consensus building and justification.[44] This view, furthermore, speaks to a conservative legal culture.[45]

More perplexing, however, is that South African legal culture, with and after the advent of the Constitution, still believes in the "neutrality" of the private law frameworks.[46] According to Bhana and Zitzke, the pre-constitutional (liberal) ideologies on which the private law frameworks are based became so "naturalised" that judicial and legal decision-makers are unaware of the ideologies that underpin their reasoning processes.[47] The net result of this lack of ideological awareness, as cautioned by Zitzke, is that current reasoning processes inadvertently may promote the classical liberal tendencies of the private law frameworks, even if judicial and legal decision-makers are "committed to the transformative potential of the Constitution".[48]

With these limitations of the private law frameworks in mind, the transformative constitutionalism paradigm will require a fundamental shift in terms of its underpinning ideologies and the legal fraternity's lack of awareness of the way in which ideology (together with legal culture) influences

[39] Zitzke (2017) *Fundamina* 186-187.

[40] Froneman (2005) *Stell LR* 5-6, 9-10; Bhana (2008) *SAJHR* 302; Zitzke (2014) *Acta Academia* 57; Bhana (2015) *SALJ* 128; Zitzke (2017) *Fundamina* 186.

[41] D Johnson, SA Pete & M du Plessis *Jurisprudence – A South African Perspective* (2001) 160-163. See also Froneman (2005) *Stell LR* 6; Bhana (2008) *SAJHR* 302; Zitzke (2017) *Fundamina* 186.

[42] Zitzke (2017) *Fundamina* 188.

[43] Bhana (2008) *SAJHR* 302. See also AJ Van der Walt "Kritiese Vrae oor die Leerstuk van Subjektiewe Regte in die Suid-Afrikaanse Regsleer" (1995) 28 *DJ* 43 44, 47; Zitzke (2017) *Fundamina* 186.

[44] Van der Walt (1995) *DJ* 47, 56; Zitzke (2014) *Acta Academia* 61.

[45] Zitzke (2014) *Acta Academia* 61.

[46] Zitzke (2014) *Acta Academia* 61. See also Bhana (2008) *SAJHR* 310.

[47] Van der Walt (1995) *DJ* 48; Bhana (2008) *SAJHR* 302; Zitzke (2014) *Acta Academia* 61; Bhana (2015) *SALJ* 128; Zitzke (2017) *Fundamina* 186.

[48] Froneman (2005) *Stell LR* 15; AJ Van Der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 *Fundamina* 1 17; Zitzke (2017) *Fundamina* 189-190.

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private law frameworks.[49] However, in creating a single system of law, the transformative paradigm must also rely on the specialisation provided by the private law frameworks. These considerations in terms of ideology, the lack of ideological awareness, and the specialisation provided by the private law frameworks, are discussed in turn.

2 2 Navigating transformation: The imperative of judicial mindset shifts

In terms of the ideologies underpinning private law frameworks, a more full-bodied conception of human dignity is needed. As opposed to the pre-constitutional disposition, there is a need to connect human dignity to values of substantive equality, freedom, and ubuntu devoid of extreme deficiency or excess, that must permeate individuals' pursuits of the good life.[50] Arguably, this will entail an ideological shift in the frameworks of the common law from (classical) liberalism to greater collectivism in regulating private relationships (with the *caveats* that the individual can neither remain unfettered nor be subsumed completely into the greater collective).[51] For this reason, the pursuit of the good life must also be characterised by collectivist values such as reciprocity, solidarity, and cooperation.[52] These substitute the atomistic self with the interconnected self, who personal autonomy is not only constituted through individual abilities and achievement but also through social relationships and membership to a community.[53] A greater focus should also be placed on attaining social justice in private relationships, contextualised by a more egalitarian society.[54] The transformative constitutionalism paradigm, therefore, requires that an adequate balance must be struck between individual and collectivist values within the frameworks of private law.[55]

To attain such an adequate balance, the overarching conservative culture that informs private law arguably also requires transformation.[56] In general terms, traditional beliefs about the "neutrality" of the common law frameworks must be dispensed with while a more critical legal mindset must be adopted.[57] Legal decision-makers, especially the judiciary, must confront the ideological nature of adjudication, recognising that claims of legal neutrality, certainty, and efficacy often conceal concerns within a conservative legal culture, particularly in the South African context.[58] The judicial mindset must be more amenable to purposive adjudication that is "policy-orientated and consequentialist"

[49] Bhana (2015) *SALJ* 131; Zitzke (2015) *CCR* 297.
[50] Nedelsky (1993) *Rev Const Stud* 8, 15; Klare (1998) *SAJHR* 159.
[51] Bhana & Visser (2019) *SAJHR* 107.
[52] Kennedy (1976) *Harv LR* 1717; Bhana (2008) *SAJHR* 310.
[53] Kennedy (1976) *Harv LR* 1717; Bhana (2008) *SAJHR* 310.
[54] Nedelsky (1993) *Rev Const Stud* 8; Bhana (2008) *SAJHR* 301; Bhana (2015) *SALJ* 124.
[55] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 40; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) para 12; Zitzke (2014) *Acta Academia* 57-60; Bhana & Visser (2019) *SAJHR* 109-110; J Neethling & JM Potgieter *Law of Delict* 8 ed (2020) 41-44.
[56] Bhana (2008) *SAJHR* 310; Zitzke (2014) *Acta Academia* 61; Bhana (2015) *SALJ* 130-131.
[57] Van der Walt (1995) *DJ* 57, 59-60 Froneman (2005) *Stell LR* 19-20; Bhana (2008) *SAJHR* 310; Zitzke (2014) *Acta Academia* 61; Bhana (2015) *SALJ* 130-131.
[58] Nedelsky (1993) *Rev Const Stud* 19; Van der Walt (1995) *DJ* 48-49; Froneman (2005) *Stell LR* 4; Bhana (2015) *SALJ* 130-131; Zitzke (2017) *Fundamina* 186.

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in nature.[59] Ultimately, a more progressive legal culture must evolve that utilises a range of legal modes of reasoning suitable for transforming private law frameworks. Thus, judges ought to utilise various modes of legal reasoning that prescribe standards of conduct for the broader collective and its constitutive parts. Such an approach will balance individual and collective interests in maintaining social cohesion to realise the harmonious development of individuals.[60]

At this juncture, it is prudent to highlight a few synoptic observations concerning legal modes of reasoning and their connection to their underpinning legal culture and ideology.[61] The preference by judges for a particular mode of legal reasoning plays out on an ideological continuum, where the ideologies of individualism and collectivism are situated at the opposite ends of this spectrum.[62] The connection between a legal mode of reasoning and an ideology speaks either to a conservative or progressive legal culture.[63] Formalistic modes of reasoning are generally connected to a conservative legal culture that ascribes to an individualistic ideology, while purposive modes of reasoning are generally connected to a progressive legal culture that ascribes to a collectivist ideology. As there is a connection between the concepts of legal reasoning, culture, and ideology, the manifestation of one of these concepts, for example legal reasoning, as either formalistic or purposive will unmask the remaining concepts as evaluative tools. Both the substance and method of the common law frameworks tend to reflect the same constitutive ideology and attendant cultural beliefs and modes of legal reasoning, as there is usually a correlation between substance and method in this regard.[64]

In transforming the private law frameworks, the judiciary must also engage with the specialisation provided by these frameworks while developing them in terms of the substantially progressive and transformative aims of the Constitution. In more concrete terms, the constitutionalisation of the common private law ought to facilitate the cooperative growth between it and the Constitution into a single, integrated, and constitutionalised body of modern law.[65] As cautioned by Zitzke, the judiciary cannot create transformed private law frameworks by solely relying on the Constitution and ignoring the former's frameworks ("constitutional over-excitement")[66] or by engaging cursorily with

[59] Bhana (2015) *SALJ* 130-131. See also Froneman (2005) *Stell LR* 5.

[60] RC Post "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California LR* 691 711, 716; Nedelsky (1993) *Rev Const Stud* 17.

[61] This is because this legal phenomenon has already been analysed in great detail by academic commentators and only the general tenets are highlighted here. See generally Kennedy (1976) *Harv LR* 1685; Cockrell (1992) *SALJ* 40; Klare (1998) *SAJHR* 146; Bhana (2008) *SAJHR* 300; Zitzke (2014) *Acta Academia* 52; Bhana (2015) *SALJ* 122.

[62] Kennedy (1976) *Harv LR* 1713-1724; Nedelsky (1993) *Rev Const Stud* 11-12; Cockrell (1992) *SALJ* 41.

[63] Zitzke (2014) *Acta Academia* 61.

[64] Kennedy (1976) *Harv LR* 1713, 1756; Cockrell (1992) *SALJ* 43; Froneman (2005) *Stell LR* 6-7, 19; Klare (1998) *SAJHR* 168, 170; Bhana (2008) *SAJHR* 302-303; Zitzke (2014) *Acta Academia* 61; JC Van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) para 27.

[65] JM Burchell "The Protection of Personality Rights" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 639 650, 653.

[66] Zitzke (2015) *CCR* 267-270, 284-285.

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the Constitution in such a manner that it has no substantive transformative effect on the private common law ("constitutionally-wanting reasoning").[67]

This article adds another category of a non-transformative approach, namely defective conversion, which draws from both constitutional over-excitement and constitutionally-wanting reasoning. Defective conversion refers to the situation where a court attempts to align the common law and the Constitution as two converging sources of law but does so unsatisfactorily (there is a substantial mismatch as mentioned earlier). In essence, what it means is that when following the principle of a single system of law, a court fails to utilise the specificity and specialisation of the common law to realise the substantive transformative aims of the Constitution. The content of both the common law and the Constitution together with their "convergence" (read as alignment) is inadequately dealt with, which gives rise to an incoherent and unstructured "constitutionalised" body of law that effectively impedes purposeful constitutional transformation.

In response to this, a more rigorous mode of constitutional analysis is called for, where the framework of the common law is systematically and coherently constructed within the transformative aspirations of the Constitution.[68] In doing so, the private law frameworks can give specific content and meaning to constitutional concepts, while the Constitution can adjust the substance and adjudication of the private law frameworks to fit a transformative constitutionalism paradigm.[69]

2 3 Effecting transformation: Ideology and human dignity

To weave the ideological dimensions of the transformative constitutionalism paradigm together for purposes of infusing the Constitution's objective normative value system into the private law frameworks, human dignity must be conceptualised as a multifaceted constitutional value. This requires the human personality to be articulated as a composite legal interest.[70] In doing so, human dignity infuses the human personality with an individual's absolute inner worth.[71] This promotes the constitutional imperatives aiding individuals to develop their personalities in their pursuit of the good life and the maintenance of social stability of the broader collective.[72] According to Christopher McCrudden and Rinie Steinman, these constitutional imperatives must be further understood in terms of a fundamental claim regarding the absolute inner worth of individuals and its sub-components – these are the

[67] Zitzke (2016) *THRHR* 105.

[68] Bhana (2008) *SAJHR* 309-310; Bhana (2013) *SAJHR* 360. See also AJ Van Der Walt *Constitutional Property Law* (2005) 433-434; S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762 763-764, 787.

[69] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 36; A Van Aswegen "The Implication of a Bill of Rights for the Law of Contract and Delict" (1995) 11 *SAJHR* 50 62-63; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 87.

[70] Visser (2020) *SAJHR* 248-249; Visser (2021) *Stell LR* 275.

[71] Visser (2020) *SAJHR* 248-249; Visser (2021) *Stell LR* 275.

[72] *Bernstein v Bester* 1996 2 SA 634 (CC) para 65; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 5 SA 3 (CC) para 36; Nedelsky (1993) *Rev Const Stud* 8, 12.

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individualistic and collectivist dimensions.[73] Each of these is briefly discussed in concluding this part.

The fundamental claim conveys the axiomatic notion that every individual has equal, unconditional, and inestimable absolute inner worth simply by being human.[74] The absolute inner worth of individuals challenges and transcends conventional measures of worth (as associated with classical liberalism) and seeks rational and universal paradigms to perceive human worth (in the pursuit of obtaining social justice in the private realm).[75] Therefore, the fundamental claim rejects the (classical) liberal conception of human worth in which individuals are distinguished by societal roles and prudential considerations such as social hierarchy, wealth, and privilege.[76] Instead, the realisation of this absolute worth must be guided further by its sub-components (or "dimensions", as they are referred to in the rest of this article).

The individualistic dimension interrogates the unique human characteristics that bestow absolute inner worth upon individuals.[77] These characteristics are rooted in the concept of autonomous moral human agency, wherein individuals possess the capacity for moral choice and practical reason to shape their own lives.[78] This dimension highlights the significance of self-creation and self-realisation, as they enable individuals to unlock their unparalleled potential and live a meaningful and good life by utilising these unique human characteristics.[79] The human personality encompasses a range of "physical and spiritual-moral" characteristics that translate into a variety of distinct personality rights in positive law.[80] Apart from sustaining an individual's unique individual existence, these characteristics also promote the personal integrity of an individual.[81] Accordingly, it is crucial to recognise that reducing an individual's personality to a single trait hinders their ability to convey their

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[73] C McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *The European J of Intl Law* 655 679-680; AC Steinmann "The Core Meaning of Human Dignity" (2016) 19 *PELJ* 1 5-8 <https://doi.org/10.17159/1727-3781/2016/v19i0a1244> (accessed 10-12-2023). See also *Ferreira v Levin* 1996 1 SA 984 (CC) para 49; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development* 2014 1 SACR 327 (CC) para 52.

[74] *S v Makwanyane* 1995 3 SA 391 (CC) para 328; H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 171 217; Ackermann *Human Dignity* 4, 55; A Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* (2014) 38.

[75] *S v Makwanyane* 1995 3 SA 391 (CC) para 328; E Schockenhoff *Natural Law & Human Dignity: Universal Ethics in a Historical World* (2003) 172-173.

[76] Botha (2009) *Stell LR* 217-220; R Bayefsky "Dignity, Honour, and Human Rights: Kant's Perspective" (2013) 41 *Political Theory* 809 818-819.

[77] McCrudden (2008) *The European J of Int Law* 680-681; Botha (2009) *Stell LR* 183, 193; Ackermann *Human Dignity* 23-24.

[78] S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 6-7; McCrudden (2008) *The European J of Int Law* 659-660; LM Henry "The Jurisprudence of Dignity" (2011) 160 *U Pa LR* 169 206-208; Hughes *Human Dignity* 42.

[79] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 23; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 37; Nedelsky (1993) *Rev Const Stud* 8; Liebenberg (2005) *SAJHR* 7; Botha (2009) *Stell LR* 189; Hughes *Human Dignity* 42.

[80] Physical characteristics encompass bodily integrity, health, physical freedom, and sensory feelings, while spiritual-moral characteristics include self-esteem, public esteem, autonomy, and sentiments towards moral integrity. These characteristics align with personality rights such as bodily integrity, physical liberty, reputation, dignity, privacy, identity and feelings. Neethling et al *Personality Rights* 25-38.

[81] Henry (2011) *U Pa LR* 215.

"authentic" inner worth.[82] Therefore, the human personality is multifaceted, dynamic, and ought to envelope these unique characteristics.[83]

The collectivist dimension focuses on the socialisation of absolute inner worth and the attendant unique human personality.[84] It recognises that the human personality is not solely an "individualistic good" but also encompasses the social community and its diverse personalities as a "collectivist good".[85] This dimension seeks to realise absolute inner worth through the principles of public recognition and human solidarity.[86] Public recognition entails respecting and acknowledging each individual's personal integrity, while human solidarity fosters cooperation and unity within the community.[87] It surpasses mere non-interference (a negative obligation) and aims for socialisation that allows individuals to develop their full potential and lead meaningful lives (a positive obligation).[88] Human solidarity, as linked to the constitutional value of *ubuntu* in the South African context, is rooted in the interplay between individual and collective interests, promoting reciprocity and balancing the interests of individuals and the broader community.[89] The benchmark of reciprocity guides social interactions and forms the basis for creating norms and values that preserve social identity and stability of the collective while realising the absolute inner worth of individuals.[90]

3 *Le Roux v Dey* and the *iniuria* approach

Before the *Le Roux* judgment, the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*[91] noted that there appears to be a convergence between the framework of the common law of personality and the Constitution regarding the composite nature of the human personality. Thus the stage was set for continued cooperative growth between framework of the common law of personality and the Constitution, as both sources recognised the same series of personality rights (a convergence in substance) and their concomitant articulation and adjudication through the requirements of the *actio iniuriarum* (a convergence in method).[92]

On the facts of *Le Roux*, three high school boys, the applicants, created and distributed a manipulated image of the respondent, the vice-principal of a high school, together with another man, the principal of the same school, in

[82] 215-216.
[83] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Khumalo v Holomisa* 2002 5 SA 401 (CC) 27; AR Monteiro *Ethics of Human Rights* (2014) 312.
[84] *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 74. See also Botha (2009) *Stell LR* 187; Henry (2011) *U Pa LR* 220-221; Ackermann *Human Dignity* 150-151.
[85] Nedelsky (1993) *Rev Const Stud* 12; Botha (2009) *Stell LR* 193.
[86] N Rao "Three Concepts of Dignity in Constitutional Law" (2011) 86 *Notre Dame LR* 183 243. See also Liebenberg (2005) *SAJHR* 11.
[87] *MEC Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 53; Botha (2009) *Stell LR* 190; Rao (2011) *Notre Dame LR* 243; Ackermann *Human Dignity* 74.
[88] Nedelsky (1993) *Rev Const Stud* 8; Botha (2009) *Stell LR* 187.
[89] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 113.
[90] Post (1986) *California LR* 711, 716.
[91] 2007 8 BCLR 910 (SCA) paras 15 and 24.
[92] Visser (2021) *Stell LR* 283-286.

which they were depicted in a sexually compromising position.[93] The court was tasked to adjudicate claims for the infringement of the personality rights to subjective dignity and reputation arising from this factual matrix.[94]

In determining whether the respondent's rights to subjective dignity and reputation were actionable in terms of the *actio iniuriarum*, the court first investigated the substance of the common law of personality's framework in considering whether various personality infringements (*"iniuriae"*) were actionable on the same factual matrix as guided by the Constitution with reference to human dignity.[95] In terms of the court's understanding of human dignity, it initially noted that human dignity is an all-encompassing concept that traversed various values and interests, including those relevant to the law of personality (without providing an expansive discussion).[96] Curiously, however, and without further explanation it appeared that the court then affixed subjective feelings of self-worth to the meaning of human dignity in these circumstances.[97] From this understanding of human dignity, the court remarked that all the discreet and distinct personality rights are rooted in subjective feelings of self-worth.[98] More specifically, an infringement of any personality right "will almost always be accompanied by an affront to dignity".[99] Therefore, the court held that this perceived "constant overlapping of manifestations of *iniuria*", as a matter of principle, should exclude the actionability of multiple *iniuriae* on the same factual matrix.[100]

Consequently, the court effectively abated the composite nature of the human personality, as different personality rights on the same set of facts were not actionable based on the court's conceptions of human dignity and its effect on the human personality. The conceptual distinctiveness of the different personality rights became superfluous, as these essentially amounted to an affront to subjective feelings of self-worth (and not distinctive interests in the human personality).

Thereafter, the court took an analogous approach to the method of the framework of the common law of personality as represented by the requirements of the *actio iniuriarum*. First, the court implied that once the factual violation requirement of the personality right to reputation is established, it will simultaneously establish the factual violation requirement of

93 *Le Roux v Dey* 2011 3 SA 274 (CC) paras 12-20.

94 *Le Roux v Dey* 2011 3 SA 274 (CC) paras 12-20. It is important to note that this inquiry should not be confused with the assessment of the *quantum* of general damages for personality right infringements. Here, courts award a globular amount for the different infringements. See *Independent Newspapers Holdings Ltd v Suliman* 2004 3 All SA 137 (SCA) para 57.

95 *Le Roux v Dey* 2011 3 SA 274 (CC) paras 138-142.

96 Para 138.

97 Para 138.

98 *Le Roux v Dey* 2011 3 SA 274 (CC) para 141. In more recent judgments, the courts continue to perpetuate this abated understanding of the human personality. See *Moyane v Lackay* (35580/15) 2017 ZAGPPHC 1262 (24 November 2017) para 16 *SAFLII* <https://www.saflii.org/za/cases/ZAGPPHC/2017/1262.html> (accessed 10-12-2023); *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2023 1 SA 353 (CC) para 50; *K.A.B v National Union of Metal Workers of South Africa (NUMSA)* (1438/2021) 2023 ZAFSHC 288 (21 July 2023) paras 28-29 *SAFLII* <http://www.saflii.org/za/cases/ZAFSHC/2023/288.html> (accessed 10-12-2023).

99 *Le Roux v Dey* 2011 3 SA 274 (CC) para 141.

100 Para 142.

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the personality right to subjective dignity.[101] The court arrived at this decision as the infringement of the respondent's subjective feelings of self-worth was their decisive consideration and the manipulated image of the respondent inevitably infringed his subjective feelings of self-worth (even though different tests existed to determine the factual violation of the implicated personality rights).[102] Secondly, with the wrongfulness requirement, the court further implied that the infringement of the respondent's subjective feelings of dignity would also sustain a finding of wrongfulness for either of the personality rights to subjective dignity or reputation.[103] This reasoning was based on the consideration that the infringement of the respondent's subjective feelings of self-worth would by the same token, as it was notionally the case with the factual violation requirement, be seen as objectively insulting.[104]

Therefore, the court approached the method of the common law of personality in such a manner that realised an abated concept of the human personality which is limited to subjective feelings of self-worth in positive law. Most noteworthy is that the court's circular approach to the factual violation and wrongfulness requirements prevented the articulation of the human personality as a composite legal interest. Consequently, little reliance is placed on the content of the specific tests regarding the factual violation of the different personality rights, as it appears that these tests were usurped by a determination of whether a plaintiff's subjective feelings of self-worth were infringed. In doing so, it appears that the need for the separate application of the wrongfulness requirement from the factual violation requirement is obviated, as the infringement of the subjective feelings of self-worth would obliquely manifest objectively.[105]

Based on these considerations, the court found that the respondent's reputation was actionable but not his subjective dignity as a distinct and separate personality right.[106]

Proceeding from this discussion of the *Le Roux* judgment with its approach to the substance and method of the common law of personality's framework, I argue that the court adopted a so-called "*iniuria* approach".[107] In essence, this approach entails that the mere existence of some vague form of personality harm (an *iniuria* in the broadest sense of generality), probably linked to the plaintiff's subjective feelings of self-worth, is sufficient to sustain a claim based on the *actio iniuriarum* (implicating the common law's substance). With this approach, there is a failure to interrogate which specific personality right or rights are implicated by the defendant's injurious conduct, or there is simply a conflation between the different personality rights to fit this broad construction of personality harm. This leads to an ambiguous and probably

[101] Paras 138-149.
[102] Para 149.
[103] Paras 145-146, 148-149.
[104] Paras 145-146, 148-149.
[105] Paras 144-146.
[106] Paras 149-151.
[107] C Gowar & CJ Visser "Distinguishing between Dignity, Identity and Privacy: Is It Really Necessary? *Kumalo v Cycle Lab (Pty) Ltd* (31871/2008) [2011] ZAGPJHC 56" (2012) 75 *THRHR* 154 158; C Gowar & CJ Visser "*Actio Iniuriarum* – One Action, But Only One *Iniuria*? *Le Roux v Dey* 2011 3 SA 274 (CC)" (2013) 76 *THRHR* 490 496-497.

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indistinct application of the requirements of the *actio iniuriarum* in trying to find some connection between the defendant's conduct and this broad construction of personality harm (implicating the common law's method).[108] The *iniuria* approach presents a stark and radical departure from the traditional understanding that the human personality is a composite legal interest, to which the requirements of the *actio iniuriarum* are applied distinctively and separately to realise this compositeness.[109]

4 Transformative constitutionalism, the *iniuria* approach, defective conversion, and legal culture

At face value, the judicial line of reasoning embedded in the *iniuria* approach presents an appealing and efficient approach to the adjudication of abstract, immaterial, and esoteric personality rights in an arguably materialistic but virtue-conscious society. Substantively, the notion that the human personality with its panoply of personality rights is rooted in subjective feelings of self-worth comes across as a self-evident truth, as the core of the human experience undoubtedly includes highly personal experiences. Methodologically, as a means to express these personal experiences materially, the most logical mode of inquiry would seem to involve an investigation into the existence of a negative impairment of these personal experiences. Consequently, the perceived unnecessary quagmires associated with human dignity and the human personality as value-laden concepts are easily dispensed with when the reasoning process recognises that the core of this inquiry is the manifestation of subjective feelings of self-worth and their infringement.[110] The *iniuria* approach proposes a reasoning process that can be easily followed and reproduced in various contexts involving personality rights without being unexpectedly confronted with a range of competing values stretching the apparent determinacy of legal reasoning.

Despite the appeal and apparent efficacy of the *iniuria* approach, it falls short of the dictates of a "conscientious post-apartheid" legal inquiry.[111] This is due to this approach's preoccupation with subjective feelings of self-worth, which in turn frustrates the constitutional development of the common law's framework. Specifically, this approach entails a defective conversion between human dignity, the human personality, and the *actio iniuriarum* as perpetrated by a conservative legal culture with a concomitant formalistic reasoning process that obliquely promotes (classical) liberalism through its "veneer" of practicality.[112] These considerations inform the remainder of this part of the article.

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[108] It is interesting to note that around the same time, other judgments of the High Court also appeared to follow this *iniuria* approach. See *Kumalo v Cycle Lab (Pty) Ltd* (31871/2008) 2011 ZAGPJHC 56 (17 June 2011) *SAFLII* <http://www.saflii.org/za/cases/ZAGPJHC/2011/56.html> (accessed 10-12-2023); *Wells v Atoll Media (Pty) Ltd* 2010 4 All SA 548 (WCC).

[109] Joubert *Persoonlikheidsreg* 10-12; A Fagan "Dignity and the Political Right to Freedom" in AJ Barnard-Naude, D Cornell & F Du Bois (eds*) Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2008) 177 180-181; Ackermann *Human Dignity* 87-89; Neethling et al *Personality Rights* 25-40.

[110] Van der Walt (1995) *DJ* 48; Froneman (2005) *Stell LR* 13.

[111] Zitzke (2014) *Acta Academia* 56. See also Bhana (2015) *SALJ* 136.

[112] Bhana (2015) *SALJ* 136.

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Starting with defective conversion and the substance of the *iniuria* approach, collapsing human dignity and the human personality into subjective feelings of self-worth bypasses the composite nature of the human personality and the multifaceted nature of human dignity. The ostensible alignment between the substance of the common law's framework and the Constitution is a defective conversion for several reasons. First, at the very basic level of the common law, the human personality is doctrinally articulated as a composite interest consisting of personality rights related to the physical and spiritual-moral interests of the human personality.[113] Physical interests include the personality rights to bodily integrity and physical liberty.[114] Spiritual-moral interests include the personality rights to reputation, subjective dignity, privacy, identity, and feelings.[115] Each of these personality rights is intended to provide pragmatic protection to various personality interests in terms of a compositely articulated human personality.[116] Secondly, with the aid of human dignity, as underscored by the individualistic dimension of the relevant constitutional imperatives, these personality rights extend beyond protecting an abstract notion of human dignity and specifically seek to protect distinct characteristics of the unique human image.[117] These include physical characteristics embodying bodily integrity, health, physical freedom, and sensory feelings, and spiritual-moral characteristics embodying self-esteem, public esteem, informational autonomy, and sentiments towards moral integrity and kinship.[118] Subsequently, it appears that the range of personality rights would have corresponded and subsequently converged with the unique characteristics of the human image coherently, which would have amounted to an effective conversion.[119]

Shifting the defective conversion inquiry to the method of the *iniuria* approach, the requirements of the *actio iniuriarum* ((i) a factual violation of a recognised personality right[120] in a (ii) wrongful, and (iii) intentional manner)[121] suffered the same fate as the substance of the mentioned approach,

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[113] Joubert *Persoonlikheidsreg* 113; Neethling et al *Personality Rights* 25-38.

[114] Joubert *Persoonlikheidsreg* 113; Neethling et al *Personality Rights* 25-38.

[115] Joubert *Persoonlikheidsreg* 113; Neethling et al *Personality Rights* 25-38.

[116] Joubert *Persoonlikheidsreg* 124-129.

[117] 124-129.

[118] J Neethling "Die Betekenis en Beskerming van Eer, Dignitas en Menswaardigheid in Gemeenregtelike en Grondwetlike Sin" in C Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 85 94-99.

[119] Visser (2021) *Stell LR* 281-285. This apparent convergence is outlined here for clarification. First, the personality right to bodily integrity appears to be closely associated with the dignitarian characteristic of the physical human body which houses the human mind and physical-mental health. Secondly, the personality right to physical liberty seems to be related to the dignitarian characteristic of an individual's spatial freedom. Thirdly, the personality right to reputation finds association with the dignitarian characteristic of public esteem. Fourthly, the personality right to (common law) dignity resembles the dignitarian characteristic of self-esteem. Fifthly, the personality right to privacy shares a resemblance with the dignitarian characteristic of informational autonomy over one's private life. Sixthly, the personality right to identity is linked to the dignitarian characteristic of autonomy over one's likeness. Lastly, the personality right to feelings resembles the dignitarian characteristic of sentiments towards one's own moral integrity. See Neethling et al *Personality Rights* 25-38.

[120] Which combines the elements of harm, conduct, and causation in terms of the traditional elements of a delict. See Visser (2021) *Stell LR* 281.

[121] *De Lange v Costa* 1989 2 SA 857 (A) 860-861. Also see M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3 ed (2017) 371. On the court's application of the fault requirement, namely intention-based liability, it did not consider the constitutional development of the fault requirement to include negligence in addition to intent as an appropriate standard of fault (despite existing calls for such inclusion).

as these requirements collapsed into an investigative exercise into whether the plaintiff had an expectation of subjective feelings of self-worth and whether these were infringed. As mentioned earlier, the function and content of each of these requirements were effectively usurped by the methodology of the *iniuria* approach, especially the factual violation and wrongfulness requirements. Once again, the focus on subjective feelings of self-worth created a defective conversion between the method of the common law's framework, namely the *actio iniuriarum*, and the Constitution. For instance, with the factual violation requirement, its traditional methodological role is to articulate different personality rights in positive law.[122] It does so through distinctive and finely calibrated tests that have developed for the various personality rights in respect of their content, which are broadly based on the utility and quality of a plaintiff's specific personality right(s) before and after the commissioning of an *iniuria(e)*.[123] This requirement also accentuates the individual interests of the parties to an *iniuria* (the plaintiff's personality interests through a potential infringement and the defendant's interests through their harm-causing conduct).[124] Furthermore, the traditional methodological role of the wrongfulness requirement, with reference to the legal convictions of the community ("the *boni mores*"), is to weigh up the interests of individuals with those of the greater collective to determine whether it will be reasonable to impose liability for an *iniuria* in finding a legal norm violation.[125] This weighing-up exercise of the *boni mores* can be characterised as collectivist, policy-orientated, and pragmatic in nature.[126] It is important to note that this requirement further identifies the interests of the collective in addition to the

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See Visser (2020) *SAJHR* 254; *Le Roux v Dey* 2011 (3) SA 274 (CC) paras 149-151. However, for purposes of this article, an inquiry into the fault requirement falls beyond its scope as it does not directly concern the articulation of the composite nature of the human personality in positive law. The constitutional desirability of exclusively-based intention liability in the *actio iniuriarum* necessitates further research.

122 Visser (2021) *Stell LR* 281.

123 Neethling & Potgieter *Law of Delict* 288-290. A brief exposition of these distinctive tests with respect to the different personality rights is provided here for purposes of clarity and completeness. With reference to bodily integrity, its distinctive test entails an assessment as to the existence of a bodily injury (Neethling & Potgieter *Law of Delict* (2020) 392-393 and the authorities cited there in nn 60-68). Moving to physical liberty, an inquiry is made into the existence of any impediment that interferes with the plaintiff's physical-spatial autonomy (*Birch v Johannesburg City Council* 1949 1 SA 231 (T) 238). Considering dignity next, its distinctive test examines the plaintiff's expectation of self-worth and the diminution of it by the defendant's conduct (*De Lange v Costa* 1989 2 SA 857 (A) 862). In terms of privacy, its unique test examines the plaintiff's expectation of keeping certain facts private and any subsequent intrusion into this or disclosure of them (*National Media Ltd v Jooste* 1996 3 SA 262 (A) 271-272). With reference to identity, this entails an assessment of whether the plaintiff's distinctive personal features are used in a manner that does not reflect the plaintiff's true image (*O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 248; *Grütter v Lombard* 2007 4 SA 89 (SCA) para 11). In terms of reputation, an inquiry is made as to whether the plaintiff's social estimation has been lowered in the estimation of a particular community (*Mohammed v Jassiem* 1996 1 SA 673 (A) 704). Lastly, considering feelings entails an assessment of the plaintiff's expectation towards their feelings of morality, religion and kinship and the subsequent diminution of them (Neethling et al *Personality Rights* 49-51; 202-203).

124 Visser (2021) *Stell LR* 281-282.

125 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; *Marais v Richard* 1981 1 SA 1157 (A) 1168; Neethling et al *Personality Rights* 54-55.

126 For the main summative points on the wrongfulness requirement, the Constitutional Court in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) para 53 stated the following:

> "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm — indeed to respect rights — and questions the reasonableness of imposing liability."

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individual interests of the parties, through the weighing-up exercise.[127] With the functions and content of the factual violation and wrongfulness requirements, as they stood before the *Le Roux* judgment, it seemed that the *actio iniuriarum* would have provided the necessary framework to identify and adjudicate various personality rights while highlighting and balancing individual and collectivist interests or values appropriate to a transformative context (thus amounting to an effective conversion).[128]

Overall, as regards the defective conversion in terms of substance and method, the *iniuria* approach ignored the specialisation provided by the common law of personality's framework (as a manifestation of constitutional over-excitement). For instance, the human personality with reference to human dignity was incoherently conceived as subjective feelings of self-worth, which condensed the human personality into an arguably amorphous personality concept with parameters predicated on obfuscated expectations of self-worth. Furthermore, the requirements of the *actio iniuriarum*, especially the factual violation and wrongfulness requirements, became unstructured, as these requirements were relegated to finding an infringement of subjective feelings of self-worth based on criteria where there was a circular reasoning exercise about the subjective and objective nature of such an infringement. On the other side of the spectrum, this defective conversion limited the reach of the objective normative value system of the Constitution, as the reference to human dignity appeared to be a form of "constitutional window-dressing" without meaningfully engaging with the Constitution's substantive transformative aspirations (as a manifestation of constitutionally-wanting reasoning).[129] Specifically, the multifaceted nature of human dignity was discounted, which could have constitutionally enriched, adjusted, or justified the framework of the common law of personality.[130] Consequently, the substantive richness of human dignity was stunted by subjective feelings of self-worth.

On further reflection of the synoptic observations of the connection between legal modes of reasoning, culture, and ideology, as discussed in part 2, the defective conversion grounded in a preoccupation with subjective feelings of self-worth seem to point to a conservative legal culture underlying the *iniuria* approach, which relies on more formalistic modes of reasoning (which will arguably impede the constitutionalisation of the common law of personality).[131] The ideological neutrality of the *iniuria* approach is also challenged, as it seems to lean towards (classical) liberalism rather than a shift to greater collectivism.[132] To concretise these arguments further, they are extrapolated

[127] In this regard, applicable policy considerations range from individual characteristics and attributes of both the plaintiff and the defendant and the relationship between them, to more collectivist concerns. These concerns include the social, economic and legal relevance of these individual interests; factual and normative considerations contemplating an active or passive legal duty not to infringe these interests; the social and economic consequences of imposing liability for the infringement of these interests; and possible justifications for the infringement of the mentioned interests. See Van der Walt & Midgley *Delict* paras 75; 80-88; Loubser & Midgley *Delict* 152-155.

[128] Visser (2021) *Stell LR* 284-285.

[129] Zitzke (2018) *THRHR* 498.

[130] Zitzke (2015) *CCR* 274.

[131] Zitzke (2014) *Acta Academia* 61.

[132] Zitzke (2016) *THRHR* 116.

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from the court's application of the *iniuria* approach and their engagement with the substance and method of the framework of the common law of personality.

In terms of substance, the *iniuria* approach provided thin and facile conceptions of human dignity and the human personality (when compared to human dignity as a multifaceted concept and the human personality as a composite legal interest). Here, in following a formalistic mode of legal reasoning, human dignity and human personality were reduced to subjective feelings of self-worth as an unobtrusive legal formulation that limits judicial discretion in terms of legal interpretation.[133] In addition, this formalist mode of conceptualising human dignity and the human personality seems to enable judges to avoid ideological considerations, as the primacy of subjective feelings of self-worth appears to be a self-evident truth of the human experience.[134] However, under the umbrella of legal conservatism, the specific manner in which the human personality is conceptualised causes the veneer of ideological neutrality to crack, as subjective feelings of self-worth do not only imply a general sense of individualism, but also a specific type of ideology. Accordingly, subjective feelings of self-worth denote (classical) liberalism, as the dominance of personal autonomy and liberty is venerated with its associated concepts of self-interest, self-reliance, and self-determination as opposed to the interconnectedness and solidarity of individuals.[135] What is more, within the dictates of (classical) liberalism, the human personality is neatly packaged into units of subjective feelings of self-worth measurable in money, as a "price" must be paid for their infringement, which effectively functions as a commodity in a *laissez-faire* market economy.[136]

Moving on to method, the *iniuria* approach's influence on the factual violation and wrongfulness requirements perpetuates the previously mentioned conservative legal culture with its attendant modes of formalist reasoning constituted in a (classical) liberal ideology (as predisposed by the synoptic observation of the correlation between the substance and method of the common law's framework).[137] For instance, with the particular permutation of the factual violation and wrongfulness requirements, the effective consideration and balancing of individual and collectivist interests were prevented. More specifically, the *iniuria* approach is more amenable to contemplating the individual effects that the (potential) impairment had on the plaintiff by focusing on individualistic values to determine the factual violation requirement with the overarching focus on subjective feelings of self-worth, while ignoring the broader societal relevance of such effects and not applying the collectivist values implied by the wrongfulness requirement. In doing so, the interconnectedness of individual personalities is not contemplated. This is because this approach focuses on the autonomy and liberty of an atomistic individual where the law of personality propagates a "system of corrective

[133] Kennedy (1976) *Harv LR* 1689-1690 and 1752-1753; Cockrell (1992) *SALJ* 43-44; Klare (1998) *SAJHR* 149.
[134] Cockrell (1992) *SALJ* 41-45; Froneman (2005) *Stell LR* 6; Bhana (2015) *SALJ* 136.
[135] Nedelsky (1993) *Rev Const Stud* 11-12; Kennedy (1976) *Harv LR* 1713; Bhana (2015) *SALJ* 124.
[136] Zitzke (2014) *Acta Academia* 65. See also Zitzke (2016) *THRHR* 117.
[137] Bhana (2008) *SAJHR* 303; Zitzke (2014) *Acta Academia* 65.

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justice based on individual autonomy" and liberty, within which individuals are free to exercise their autonomy and liberty as long as they do not cause harm to others unjustifiably.[138] Consequently, this approach speaks to (classical) liberalism.

Within such a system, the role of judges is limited to that of "night watchmen" who protect individual interests from unjustifiable infringements or limitations in following a conservative and formalistic mode of legal reasoning.[139] This conservatism and formalism require a judge only to employ deductive reasoning to find a singular outcome, such as the infringement of subjective feelings of self-worth, albeit abstractly, on a set of facts.[140] Thus, the discretion of judges is limited to mechanically finding a singular outcome, as perceived to be the most logical mode of inquiry to a potential *iniuria*, without further employing normatively rich or purposive modes of legal reasoning.[141] However, according to Zitzke, this type of reasoning results in a "formalist error" which entails the flawed belief that legal reasoning "results in one legal answer to the exclusion of all others" while various policy considerations are at play.[142] In this instance, the error lies in a singular finding of the infringement of subjective feelings of self-worth as opposed to the possible articulation and adjudication of various personality rights. Such compositeness extends far beyond subjective feelings of self-worth, with their connotation to (classical) liberalism, and addresses distinctive interests in the human personality encompassing both individualistic and collectivist values as policy considerations. Therefore, this formalist error shows a further crack in the veneer of ideological neutrality of the *iniuria* approach as individualistic values are favoured over more collectivist ones.

Ultimately, defective conversions underpinned by a conservative legal culture with attendant modes of formalistic reasoning promote a (classical) liberal ideology. This requires a further interrogation into the ideological dimensions of these defective conversions to demonstrate completely the way in which these conversions frustrate the constitutional development of the framework of the common law. To do so, I rely further on the ideological dimensions of the transformative constitutionalism paradigm as they relate to constitutional imperatives, underscored by the fundamental claim of absolute inner worth with both individualistic and collectivist dimensions.

In terms of the fundamental claim, the *iniuria* approach commodifies the human personality through an oversimplification of the human person experience. This relies on the self-explanatory predisposition that individuals have subjective feelings of self-worth that are mechanically assuaged through monetary compensation when infringed. This commodification entrenches

[138] RW Wright "Causation, Responsibility, Risk, Probability, Named Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts" (1988) 73 *Iowa LR* 1001 1004. See also CH Schroeder "Corrective Justice and Liability for Increasing Risks" (1990) 37 UCLA LR 439 445-446.

[139] Kennedy (1976) *Harv LR* 1773; Cockrell (1992) *SALJ* 43; Froneman (2005) *Stell LR* 6-7.

[140] Froneman (2005) *Stell LR* 7.

[141] Kennedy (1976) *Harv LR* 1752; Cockrell (1992) *SALJ* 43; Froneman (2005) *Stell LR* 7; Zitzke (2014) *Acta Academia* 56; Bhana (2015) *SALJ* 124, 127.

[142] Zitzke (2014) *Acta Academia* 61.

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the *status quo*, as individuals with high-ranking social status, privilege, and wealth will receive a higher "price" for the infringement of their subjective feelings of self-worth than those who are less fortunate, or oppressed socially or materially.[143] In a *laissez-faire* market economy, the previously mentioned conventional measures of ascribing worth are factored in when monetary compensation is awarded.[144] These conventional measures of worth diminish the absolute worth of individuals as associated with a multifaceted concept of human dignity that derives its value from the unique characteristics of the human image and the benchmark of reciprocity, as guided by human solidarity and interdependence.[145] Therefore, the *iniuria* approach advances a (classical) liberal conception of human worth that is at odds with the shifts required in terms of the frameworks of the common law. This is because individuals will receive differing values of worth, as conventional measures based on stagnant social strata are utilised as opposed to more universal paradigms.[146]

With (classical) liberalism, concerning the individualistic dimension, it must be realised that a greater focus on subjective feelings of self-worth prevents the articulation of the human personality as a collection of the essential characteristics of the human image. When the human personality is reduced to a single trait such as subjective feelings of self-worth, an individual is not legally conceived as a physical-mental and spiritual-moral being who is endowed with an intricate range of distinctive human qualities.[147] The compositeness and personal integrity of the human personality are lost. With such loss, an individual is incapable of fully expressing their absolute inner human worth when they cannot utilise the full range of distinctive human qualities in realising a good and meaningful life. By limiting the individualistic dimension of the human personality in this manner, individuals are inhibited from exercising self-creation and self-realisation, as these aspirations are superseded by a reductionist notion of what the human image constitutes. This is counterintuitive to the transformative constitutionalism paradigm.

Moving to the collectivist dimension, (classical) liberalism potentially limits social interactions to negative obligations, as individuals and the broader collective are only tasked with refraining from infringing the subjective feelings of others. As a result, the socialisation and harmonious development of individual personalities against greater collectivist values such as human interdependence and solidarity are minimised. This is unsurprising, as the *iniuria* approach creates the impression that individuals are tasked by themselves to develop their personalities, obviating the need for cooperation.[148] Furthermore, this approach fosters no shared vision of the individual and collective significance of the human personality contributing

[143] Zitzke (2014) *Acta Academia* 62. See also Van der Walt (1995) *DJ* 53-54.
[144] Zitzke (2014) *Acta Academia* 62.
[145] Gowar & Visser (2011) *THRHR* 496-497.
[146] Ackermann *Human Dignity* 21-26.
[147] *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 64.
[148] Kennedy (1976) *Harv LR* 1713; Klare (1998) *SAJHR* 152.

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towards constitutional imperatives. The resultant norms and values that will permeate social interactions will be based on the entitlement of individuals not to have their subjective feelings of self-worth infringed, as opposed to the interconnected and harmonious development of individuals and the broader collective. Such a focus on individual entitlements would limit the range of values that would infuse social interactions. There would be a greater focus on individualist values than collectivist ones and achieving a balance between individualist and collectivist values that ought to influence the framework of the common law of personality will not be realised effectively. An imbalance will be created that is the antithesis of what the transformative constitutionalism paradigm requires.[149]

In concluding this part, based on the remaining consideration of ideology underscoring the mentioned defective conversions, the *iniuria* approach, with its (classical) liberalism and legal conservatism dimensions, will not adequately balance individual and collectivist values as required by the transformative constitutionalism paradigm. With the attendant overemphasis on subjective feelings of self-worth, this, by itself, cannot do the full work of the constitutional imperatives, with their underpinning fundamental claim of absolute human worth and its associated individualistic and collectivist dimensions. Furthermore, the associated formalistic modes of legal reasoning of the *iniuria* approach cannot appreciate the various and complex layers of these constitutional imperatives with their various dimensions. The inevitable limits on judicial discretion will not achieve an adequate balance between individual and collectivist values. Thus, the *iniuria* approach's treatment of the substance and method of the common law of personality framework frustrates the latter's constitutional development and ought to be rejected in its entirety for purposes of the transformative constitutionalism paradigm.

5 Conclusion: The way forward

To conclude with the argument that the *iniuria* approach must be rejected for the reasons stated before, the impetus is provided for developing an alternative approach that is effectively constitutionalised. Preliminarily, such an alternative approach will be based on an effective conversion between the common law and the Constitution, with attendant modes of purposive reasoning to realise ideological and cultural shifts in the framework of the common law towards greater collectivism and a more progressive legal culture. Some tentative reflections of a "proto-transformative" alternative approach are mentioned here, based on the discussion in this article.

In terms of substance, the composite nature of the human personality must be constitutionally entrenched with a concomitant appreciation that the unique characteristics of the human image are both individualistic and collectivist goods. For this purpose, the fundamental claim of the relevant constitutional imperatives ought to be employed, to ensure that there is an appropriate balance between individualistic and collectivist values in conceptualising the

[149] Kennedy (1976) *Harv LR* 1713; Bhana (2015) *SALJ* 124; Bhana & Visser (2019) *SAJHR* 109-110.

human personality in positive law. Arguably, this will be achieved by imbuing absolute inner human worth with greater moral agency, as represented by the unique characteristics of the human image, and with greater social cohesion and unity as represented by human solidarity and interdependence. Proceeding from this understanding, the common law personality rights can provide concrete contexts for the objective normative value system of the Constitution, as these rights will highlight a preliminarily concrete interest in the human personality. In turn, the unique characteristics of the human image can substantively enrich or adjust these concrete interests to fit a more egalitarian and socially just society.

In terms of methodology, the distinctive application of the factual violation and wrongfulness requirements together with an effective conversion with the Constitution will be a matter of transformative necessity. For instance, the factual violation requirement must be aligned with the individualistic dimension of the relevant constitutional imperatives. This will result in the positive law applying the specific tests developed for the different personality rights to realise the unique characteristic of the human image as distinctive personality rights, to ensure the personal integrity of an individual. Arguably, in terms of a more progressive legal culture with attendant modes of legal reasoning, the ensuing reasoning processes will be analytical and normative in nature to discern and articulate the distinctive personality rights in positive law. The wrongfulness requirement, in turn, must be aligned with the collectivist dimension of the relevant constitutional imperatives. That will result in the positive law considering and balancing individual and collective interests in terms of the *boni mores* to secure social cohesion and stability. The *boni mores*, in its general form, is already adapted to a progressive legal culture with its purposive modes of reasoning.

Courts ought to articulate the connection between legal modes of reasoning, culture, and ideology explicitly and reference them in their reasoning processes. This will contextualise and entice the judicial mindset to use an ideological continuum systematically, creatively, and progressively in respect of the framework of the common law of personality, to produce more context-dependant and consequentialist outcomes when dealing with *iniuriae*.

The actual details of such an alternative approach in contemplating the further constitutionalisation of the common law of personality falls beyond the scope of this article and deserves an immersive study of its own.[150]

[150] Visser (2020) *SAJHR* 257-259.

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